No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' OPENING BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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Statutes Cited

Text Books, etc., Cited

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(b) Jurisdictional Facts and Law

This action was originally begun by the filing of a complaint in the Superior Court of Skagit County, Washington, by the appellants (citizens of the State of Washington) against Morrison Mill Co. (a corporation of the

State of Washington) and the appellee, Republic Gear Company (a corporation of the State of Michigan). R. 7. This complaint alleged different negligent acts and omissions of the two defendants which resulted in damage to the appellants. The appellee filed a demurrer to this complaint. R 15. The appellants filed in the state court an amended complaint in which all allegations of negligent acts and omissions of the Morrison Mill Co., were omitted. R. 29.

Thereupon the appellee filed petition (R. 17) and bond (R. 25) for removal to the District Court of the United States for the Western District of Washington, Northern Division, and the cause was accordingly removed to such District Court. R. 36.

The statutory provision believed to sustain the jurisdiction of the District Court is Judicial Code, §28, 28 U. S. C. §71.

The Statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, §128, 28 U. S. C. §225.

(c) The Question Involved

The question involved in this appeal is: Is a manufacturer who negligently manufactures a defective automobile part, knowing that such a defect will constitute a hidden menace to the public when such defective part is used, liable to one who is injured as a proximate result of such use?

STATEMENT OF THE CASE

The Second Amended Complaint (R. 42) filed by permission of the District Court (R. 40, 41) after necessary formal allegations, and that the Morrison Mill Company was the owner of a 2-ton truck alleged as follows:

"IV.

"That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the purpose of resale to the public an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to be installed in the truck of said Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1936, said Morrison Mill Company purchased the said axle from the said Lewis Motor Company and installed the same in the said Kenworth, two-ton truck, registration number 20463, then owned by said Morrison Mill Company.

V.

"That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel and was a suitable, safe and proper axle to be installed and used in such trucks as the

said truck of said Morrison Mill Company, and there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of the defects hereinafter set forth, and at all times up to the time of the accident hereinafter set forth, the said Morrison Mill Company had no notice or knowledge, or any reasonable opportunity to have notice or knowledge, of the defects of the said axle hereinafter set forth.

VI.

"That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construction it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

"That the said Morrison Mill Company, after purchasing the said axle installed the same upon its said truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all of the defects hereinabove set forth, a defect known to metallurgists as a 'fatigue fracture' developed in the said axle.

VIII.

"That about midnight of the 26th day of January,

1937, while the said truck of said Morrison Mill Company was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power, and thereupon stopped on the west half of said paved highway directly in the line of travel on said highway for traffic proceeding in a southerly direction.

IX.

"That while the said truck was so stopped as aforesaid on said highway as a proximate result of the negligence of said defendant Republic Gear Company, a corporation, and before it could be removed from the said highway, the car which was being driven by the plaintiff Melvin Whitehead in a careful and prudent manner, came into violent collision with the said truck, causing the damages hereinafter alleged."

Then follow the allegations of the damages suffered by the appellants "as the result of the negligence of the said defendant."

The appellee filed a demurrer to this second amended complaint upon the ground that it failed "to state facts sufficient to constitute a cause of action." R. 50.

The appellee further filed a motion to strike this second amended complaint upon the ground that it "is sham, frivolous and contains no new, different or addi-

tional material allegations from the allegations contained in plaintiff's amended complaint."

The District Court sustained the demurrer, granted the motion to strike and dismissed the action with prejudice. R. 55-57.

The appeal is taken from this order of dismissal. R. 57, 58.

(d) Specifications of Assigned Errors

The appellants rely upon the following assigned errors:

Assignment of Errors 1, 2 and 3 as set out in the Assignment of Errors filed herein. R. 58.

(e) Argument

Assignment of Error 1. The said District Court erred in sustaining the demurrer to the second amended complaint of these plaintiffs (appellants).

The cause of action stated in the second amended complaint is that the appellee placed upon the market an axle which, *through its negligence,* was defective and was bound to break under ordinary use (R. 44, 45), although it advertised and represented to the public that this axle was a suitable, safe and proper axle to be used in a truck (R. 44); that the defect was unknown to the purchaser and user, and could not have been ascertained by the use of ordinary care; that after less than three months' use the axle as a result of the defect, broke while the truck was being driven upon a bridge upon the Pacific Highway about midnight in midwinter, and before the truck could be removed from the highway, a car "which

was being driven by the plaintiff Melvin Whitehead in a careful and prudent manner" and in which the other plaintiff was a passenger, came into violent collision with the said truck.

Perhaps the best statement of the law applicable to this situation is contained in Restatement of the Law of Torts, section 395, as follows:

> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured."

The first case in any appellate court where this rule of law was applied to negligence in the manufacture of an automobile was probably the case of *Olds Motor Works v. Shaffer,* 145 Ky. 616, 140 S. W. 1047 (decided in 1911), where the rule was applied in favor of a passenger in a defective automobile, the court saying:

> "It is a matter of common knowledge that automobiles are equipped with engines operated by electricity, steam or gasoline, and are intended to travel over highways at a high rate of speed; and it is indispensable to the safety of persons using these vehicles that they should be safely and properly constructed with reference to the use for which they are intended. * * *
>
> "If an automobile is defectively or insufficiently

constructed, there can be no doubt that it is an imminently dangerous thing to life and limb, as much so as a railroad engine, or any other powerful machine. * * *

"And so there is no room for two opinions about the proposition, that an automobile comes well within the class of articles for which the manufacturer may be held liable to third persons for injuries sustained on account of defective construction."

Next comes the case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, wherein Judge Cardozo wrote:

"If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

After the handing down of this decision, the Circuit Court of Appeals, 2nd Circuit, in *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878, reconsidered a former decision and followed the rule as laid down in the above cited *Buick Motor Co.* case, saying:

"We shall not consider at length the reasons which have satisfied us that a serious mistake was made in the first decision. The reasons may be found in the opinion in the Buick case, to which we have already referred, and which render it unnecessary to traverse

the ground anew. We cannot believe that the liability of a manufacturer of automobiles has any analogy to the liability of a manufacturer of 'tables, chairs, pictures or mirrors hung on walls.' The analogy is rather that of a manufacturer of unwholesome food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the trade rotten foodstuffs. The liability of the manufacture of food products was considered by this Court at length in *Ketterer v. Armour & Co.*, 247 Fed. 921. * * * In that case we laid down the rule that one who puts on the market an imminently dangerous article owes a public duty to all who may use it to exercise care in proportion to the peril involved, and we declare that the liability does not grow out of contract, but out of the duty which the law imposes to use due care in doing acts which in their nature are dangerous to the lives of others."

The question came up before the Circuit Court of Appeals for the Sixth Circuit in *Goullon v. Ford Motor Co.*, 44 F. (2d) 310 and that court stated that the opinion of the New York Court of Appeals in the *Buick Motor Co.* case "states the rule which has been repeatedly followed and has now become the generally accepted law."

The Circuit Court of Appeals for the Eighth Circuit in *Hudson v. Moonier*, 94 F. (2d) 132, 136, stated:

> "The rule is now established that a manufacturer owes to the public a duty, irrespective of contract, to use reasonable care in the manufacture of an automobile and in applying reasonable tests to detect defects and deficiencies therein."

This rule was applied to the manufacture of an automobile by the Supreme Court of Washington in *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409, where that court said:

> "The rule in such cases does not rest upon contractural obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not readily be detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it. * * *
>
> "It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities when such absence is not readily noticeable."

And also, in *O'Toole v. Empire Motors, Inc.*, 181 Wash. 130, 42 P. (2d) 10, the Supreme Court of Washington had before it the question of whether an action for damages resulting from negligence in repairing an automobile was an action based upon tort or upon contract, and held that it was based upon tort, quoting with approval from 1 Shearman & Redfield, Law of Negligence (6th ed.), §116, as follows:

> "But where, in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could

with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission."

A particularly valuable case is the case of *Kalinowski v. Truck Equipment Co.,* 261 N. Y. S. 657 which finds that the benefit of the rule is not confined to passengers in the defective car. In that case, the defendant was negligent in the repair of a truck, with the result that an axle broke, a wheel came off and struck the plaintiff who was on a sidewalk. The court said:

> "The situations of this plaintiff and the truck were neither strange nor remote from reasonable expectation — the girl walking along a public sidewalk, the truck being driven along a public street. Negligence (under the pleading) caused the truck to break down. The sequel was something unusual, but was of a type which might be expected. And that is the test. 'It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye.' "

Other cases following and applying the rule are:

Quackenbush v. Ford Motor Co., 153 N. Y. Supp. 131;

Heckel v. Ford Motor Co., 101 N. J. L. 385, 128 Atl. 242;

Ratche v. Buick Motor Co., 358 Ill. 507, 193 N. E. 529;

Martin v. Studebaker Corporation, 102 N. J. L. 612, 133 Atl. 384.

An allegation of the complaint is that the negligence in manufacture resulted in a "fatigue fracture." As stated in *The Iron Age* of March 29, 1934, p. 74:

> "It is quite often the case that fatigue failures originate at small stress raisers at the surface, such as scale pits, foreign inclusions, tool marks, quenching cracks, etc. These imperfections are frequently imperceptible to the naked eye. * * * Once they are started the fracture progresses until complete failure occurs."

This axle with this latent defect was intended for use in a truck and, according to paragraph V. of the complaint was represented to be "a suitable, safe and proper axle to be installed and used in such trucks." It is a wellknown fact that trucks are driven on congested highways such as the Pacific Highway, and their use is not confined to bright summer days, but they are also driven on wintry nights when pavements are slick and icy and visibility poor. If the truck so equipped and so being driven sustains the inevitable breakdown while crossing a bridge, it is very probable that the car immediately following will crash into it with injury to its passengers resulting from such crash.

That such crashes have happened without the contributing negligence of the following driver is shown in the following Washington cases:

Devoto v. United Auto Transp'n Co., 128 Wash. 604, 223 Pac. 1050;

Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157;

Tierney v. Riggs, 141 Wash. 437, 252 Pac. 163;

Crowe v. O'Rourke, 146 Wash. 74, 262 Pac. 136;

Griffith v. Thompson, 148 Wash. 243, 268 Pac. 607;

Longmire v. King County, 149 Wash. 527, 271 Pac. 582;

Lindsey v. Elkins, 154 Wash. 588, 283 Pac. 447;

Frowd v. Marchbank, 154 Wash. 634, 283 Pac. 467;

Gilbert v. Solberg, 157 Wash. 490, 289 Pac. 1003;

Crooks v. Rust, 119 Wash. 154, 205 Pac. 419;

Martin v. Puget Sound Electric Railway Co., 136 Wash. 663, 241 Pac. 360;

Wheeler v. Portland-Tacoma Auto Freight Co., 167 Wash. 218, 9 P. (2d) 101;

Layton v. Yakima, 170 Wash. 332, 16 P. (2d) 449;

McMoran v. Associated Oil Co., 144 Wash. 276, 257 Pac. 846;

Henning v. Manlowe, 182 Wash. 355, 46 P. (2d) 1057;

Brauns v. Housden, 186 Wash. 149, 56 P. (2d) 1313.

We therefore respectfully submit that the second amended complaint traces the effect of the original negligence of the appellee through a chain of circumstances that is not broken by any other effective cause, to the damages which accrued to the appellants, and that therefore the demurrer to the second amended complaint should have been overruled.

Assignment of Error 2. The said District Court erred in striking plaintiffs' second amended complaint herein.

The grounds for this motion as therein stated (R. 50) are that the second amended complaint "is sham, frivolous, and contains no new, different or additional material allegations from the allegations contained in plaintiffs' amended complaint."

We have already shown that the second amended complaint states a good cause of action and therefore see no reason for any argument to the effect that it is neither sham nor frivolous, reserving any argument thereon until counsel for appellee shall show wherein this pleading was either sham or frivolous.

In answer to the claim that the second amended complaint "contains no new, different or additional material allegations from the allegations contained in plaintiffs' amended complaint," we call the attention of the court to the allegations of paragraph IX of the second amended complaint which alleges that after the breakdown of the truck "and before it could be removed from the said highway" it was struck by the car occupied by the appellants. The allegation which is new in the second amended complaint is the above quoted clause: "and before it could be removed from the said highway." This allegation effectually bars any claim that any possibility of a removal of the truck from the highway could be an intervening cause in the chain of circumstances leading up to the injuries to appellants.

From the remarks made at the hearing of this motion in the District Court it might appear that that Court was of the opinion that the appellants, having alleged in their original complaint that the Morrison Mill Company was

guilty of a negligent delay in removing the wrecked truck from the highway, were thereby estopped from now claiming that their collision occurred "before it could be removed from the said highway." This theory, however, is directly contrary to the rule of law as laid down by the Supreme Court of the United States in *Washer v. Bullitt County,* 110 U. S. 558, 28 L. Ed. 249. In that case, the plaintiffs in their original petition had alleged a payment which brought the amount sued for below the jurisdictional limit. A demurrer to this petition was sustained with leave to amend. Thereupon the plaintiffs filed an amended petition withdrawing the allegation of payments. The court said:

> "In the amended petition all the averments of the original petition by which the amount in controversy was reduced below $5,000 were withdrawn, and it was averred that the sum of $5,325.14 was due to the plaintiffs for work done under the contract. It was as competent for the plaintiffs, when leave had been given them to amend their petition, to amend it in respect to the sum for which judgment was demanded as in any other matter. The admission in the original petition of the payment of $1,800 was specifically withdrawn in the amended petition, and after the withdrawal of that admission it nowhere appeared in the record that said sum was ever paid. The admission might have been made by the inadvertence or mistake of the plaintiffs or their counsel; but however made it was within their power to withdraw it without assigning reasons for the withdrawal. They were not inexorably bound by the averments of the original petition. When a

> petition is amended by leave of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition. If its averments show that this court has jurisdiction, the jurisdiction will be maintained without regard to the original petition."

In accordance with the rule thus laid down by the Supreme Court of the United States, the validity of this second amended complaint, filed in strict accord with the order of the court, must be adjudged by its own allegations and by nothing else. Inasmuch as we have shown that it stated a good cause of action, it could not be rightly dubbed "sham" or "frivolous" and therefore the motion to strike should have been denied.

Assignment of Error 3. The said District Court erred in dismissing the said action.

The order of dismissal was based upon the sustaining of the demurrer and the granting of the motion to strike and we feel that these matters have already been covered fully in the arguments upon the two preceding assignments.

We therefore respectfully pray that the order of the District Court be reversed and the District Court be ordered to reinstate the action, overrule the demurrer, deny the motion to strike and proceed with the case.

Respectfully submitted,

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